Nos. 83-1362, 83-1363, 83-6392

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CLEVELAND BOARD OF EDUCATION,
Petitioner
vs.
JAMES LOUDERMILL,
Respondent

PARMA BOARD OF EDUCATION,
Petitioner
vs.
RICHARD DONNELLY,
Respondent

JAMES LOUDERMILL,
Cross-Petitioner
vs.
CLEVELAND BOARD OF EDUCATION, et al.,
Cross-Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF CLEVELAND FOUNDATION AS AMICUS CURIAE

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QUESTIONS PRESENTED

I. WHETHER THE DUE PROCESS CLAUSE REQUIRES, AS A MINIMUM, THAT, ABSENT EXTRAORDINARY CIRCUMSTANCES, A CLASSIFIED CIVIL SERVICE EMPLOYEE BE GRANTED AN OPPORTUNITY TO RESPOND ORALLY OR IN WRITING PRIOR TO BEING DEPRIVED OF HIS PROTECTED PROPERTY INTEREST IN GOVERNMENT EMPLOYMENT?

II. WHETHER DELAYS OF MORE THAN NINE (9) MONTHS BEFORE A CLASSIFIED CIVIL SERVICE EMPLOYEE IS GRANTED A DECISION ON HIS POST-TERMINATION ADMINISTRATIVE APPEAL VIOLATE THE DUE PROCESS CLAUSE?

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INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union of Cleveland Foundation is a chapter of the American Civil Liberties Union, a nationwide, nonpartisan not-for-profit organization dedicated to the preservation of the civil rights and liberties guaranteed to all Americans by the Bill of Rights.

Since its founding in 1920, the American Civil Liberties Union, in furtherance of its historic mission, has appeared frequently in this Court and in other courts, as counsel for a party and as an amicus curiae, in cases raising due process challenges to federal and state

*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

governmental actions infringing upon protected property and liberty interests, including those of classified civil service employees.

In this case we ask this Court to reaffirm its numerous prior holdings that, absent an emergency, the due process clause of the fourteenth amendment requires some kind of hearing before an individual is deprived of a protected property interest. Amicus also asks this Court to hold that the due process clause requires a prompt post-discharge hearing.

STATEMENT OF THE CASE

The full factual background of the case and the opinion of the court below are reported in Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983). Nevertheless, we believe it is important to set forth certain of the undisputed facts in detail.

Prior to their summary discharges by their municipal employers, James Loudermill and Richard Donnelly were classified civil service employees who could be discharged only for "cause" under the governing state statute, Ohio Rev. Code Ann. § 124.34 (Page 1978). Loudermill v. Cleveland Board of Education, supra, 721 F.2d at 551-552. Loudermill and Donnelly were summarily sent discharge notices by their municipal employers; neither was given any

opportunity to respond to the charge against him, either orally or in writing, prior to his discharge.

Loudermill and Donnelly were permitted to file an appeal with their respective civil service commissions following their discharge but neither appeal was "completed" until over eight months following the challenged discharge. Id. at 553-554. This delay did not violate state law inasmuch as the thirty-day time limit contained in Ohio Rev. Code Ann. § 124.34 (Page 1978) has been construed by the Ohio courts to be merely a guide and not a strict requirement. In re Bronkar, 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (1977).

James Loudermill was hired by his municipal employer, the Cleveland Board

of Education, as a security guard in September, 1979. At that time he completed an employment application on which he responded "No" to the question, "Have you ever been convicted of a crime (felony)?". At the end of this application Loudermill signed a statement which provided in relevant part: "I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge . . . ." Id. at 552. More than a year later a routine records check disclosed that Loudermill had been convicted of a felony in 1968, eleven years prior to his employment by the Cleveland Board of Education. Loudermill was then summarily notified by letter that he was being discharged on the grounds of dishonesty in filling out the employment application.

If Loudermill had been given any opportunity to respond to the charge before his discharge he claims he could have demonstrated his honesty and rebutted the charge against him inasmuch as he believed he had been convicted of a misdemeanor rather than a felony. Loudermill filed his appeal with the Cleveland Civil Service Commission nine days after his discharge. Id. at 553. Over eight months later the commission, by a vote of 3-2, affirmed Loudermill's discharge and rejected the recommendation of the referee that he be reinstated. The referee, the only official to hear testimony on the matter, specifically found that Loudermill had made an honest mistake concerning his conviction more than a decade before. See Loudermill's Cross-Petition for Writ of Certiorari at 2.

Richard Donnelly was employed as a bus mechanic by the Parma Board of Education. The Parma Board of Education summarily sent Donnelly a notice of discharge on August 17, 1977 because of his failure to pass an eye examination. The Board did not give Donnelly any opportunity whatsoever to respond to the charge, although he was afforded the chance to retake the eye examination. If, prior to his discharge, Donnelly had been given an opportunity to inform the Board that it still employed another bus mechanic who had failed the eye examination, the Board might have scrutinized the purported reason for the discharge and the efficacy of the eye examination requirement more closely and not discharged Donnelly. Thereafter Donnelly appealed his discharge to the

Parma Civil Service Commission which, after a delay of over nine months, ordered him reinstated, but apparently lacked the power to award back. pay. Loudermill v. Cleveland Board of Education, supra 553-554. The effect of Donnelly's reinstatement w.thout back pay was merely to convert his discharge into an uncompensated suspension. See Parma Board of Education's Petition for Writ of Certiorari at 5.

Thereafter Loudermill and Donnelly commenced the instant civil actions in federal district court, alleging that the defendants' failure to give them an opportunity before dismissal to challenge their discharges, as well as a prompt post-termination hearing, violated their fourteenth amendment rights to procedural due process. The United States District Court for the Northern District of Ohio,

John M. Manos, District Judge, dismissed both actions for failure to state a claim upon which relief can be granted. The cases were consolidated on appeal. With respect to the pre-termination due process claims the Sixth Circuit Court of Appeals reversed and held that a tenured municipal employee must be given some opportunity, either orally or in writing, to present evidence on his own behalf prior to discharge. No full-scale evidentiary hearing was required. In regard to the more than nine month delays in the post-termination appeal process the Sixth Circuit Court of Appeals found no constitutional violation and affirmed the District Court. Loudermill v. Cleveland Board of Education, supra, at 551-552. Thereafter, this Court granted the petitions and cross-petitions for certiorari.

SUMMARY OF THE ARGUMENT

In this case amicus urges this Court to reaffirm its consistent prior holdings that, absent extraordinary circumstances, the due process clause of the fourteenth amendment requires that a tenured government employee be given an opportunity to respond, orally or in writing, to the charge against him prior to termination. See, e.g., Davis v. Scherer, 52 U.S.L.W. 4956, 4958 n.10 (1984).

Any balancing of interests to determine whether the government employee is entitled to this fundamental right of a prior opportunity to be heard would be inappropriate. Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972). Nevertheless, there is a grave danger of error in summary termination decisions which can

be easily minimized by allowing the tenured employee an opportunity to respond to the charge against him. Cf. Goss v. Lopez, 419 U.S. 565 (1975). The tenured government employee has a significant interest in continued employment and the government's interest in an erroneous termination is nonexistent. The procedural protection sought here will impose no cognizable cost upon the State.

This Court should reaffirm its holdings that an individual may not be deprived of constitutionally guaranteed due process rights simply because the State did not statutorily provide them. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-432 (1983).

Finally, a delay of over nine months before a tenured government employee is

granted a decision on his post-termination administrative appeal is unreasonable and violative of the fourteenth amendment due process clause. Cf. Barry v. Barchi, 443 U.S. 55 (1979).

ARGUMENT

I. ABSENT EXTRAORDINARY CIRCUMSTANCES, THE DUE PROCESS CLAUSE REQUIRES, AS A MINIMUM, AN OPPORTUNITY TO RESPOND ORALLY OR IN WRITING BEFORE AN INDIVIDUAL IS DEPRIVED OF A PROTECTED PROPERTY INTEREST IN GOVERNMENT EMPLOYMENT.

The interest which we advance in this case was perhaps best summarized by Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170, 171-172 (1952) (concurring opinion):

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.
>
> . . . .

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

This Court has steadfastly held that some kind of hearing is required before a person is finally deprived of a protected property interest. See Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). In his survey of the elements of a fair hearing required by the due process clause, Judge Friendly concluded that a prior "Opportunity to Present Reasons Why the Proposed Action Should

Not Be Taken" is "fundamental". Friendly, supra, 123 U. Pa. L. Rev. at 1281.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), Justice Jackson, writing for the Court, concluded:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

It is the contention of amicus that a tenured government employee has a fundamental due process right to an opportunity to present reasons why he should not be terminated, either orally or in writing, before he is discharged. This Court has repeatedly recognized that

such a government employee has a right to some kind of hearing prior to discharge. See, e.g., Davis v. Scherer, 52 U.S.L.W. 4956, 4958 n.10 (1984); id. at 4960-4961 (Brennan, J., concurring in part and dissenting in part); Arnett v. Kennedy, 416 U.S. 134, 170-171 (1974) (Powell & Blackmun, J.J., concurring); id. at 195-196 (White, J., concurring in part and dissenting in part); id. at 206 (Marshall, Douglas & Brennan, J.J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 569-570 & n.7 (1972).

In this case the Court is not asked to determine the full content of such pre-termination hearing. Instead this Court is only asked to confirm that a government employee is entitled to the same minimal pre-deprivation right to respond orally or in writing to the

charge against him which is guaranteed to public school students. See Goss v. Lopez, 419 U.S. 565 (1975).

A. This Court Has Consistently Held That, Absent Extraordinary Circumstances, The Due Process Clause Requires Some Kind Of Prior Hearing Whenever A Protected Property Interest is Invaded.

It is a fundamental principle of the English common law, the source of the due process clause of the fourteenth amendment, that an individual must be afforded an opportunity to be heard before being subjected to the deprivation of liberty or property. This is clear from the oft-cited statement of Lord Loreburn in Board of Education v. Rice, [1911] A.C. 179, 182:

> I need not add that . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who

> decides anything . . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

Indeed this principle is so basic that it is considered one of the few principles of "natural justice" from which no administrator may depart. See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 n.17 (1951) (Frankfurter, J., concurring).

It is not surprising, therefore, that this Court has consistently held that the due process clause requires, absent extraordinary circumstances, some kind of a prior hearing whenever the deprivation

of a protected property interest is threatened by the government.

In Goldberg v. Kelly, 397 U.S. 254 (1970), this Court ruled that, despite the fact that a terminated welfare recipient was entitled by statute to an adequate hearing within ten days, the due process clause required an administrative hearing prior to the termination of benefits. It is noteworthy that the pre-termination protections afforded welfare recipients and found inadequate in Goldberg were more extensive than those sought by the discharged government employees in the instant case. In Goldberg, the welfare recipient was entitled to seven (7) days written notice of intent to terminate benefits and the right to a personal meeting with a caseworker and to file a written statement

with a supervisor prior to the termination. Id. at 258-259. The tenured civil service employee in Ohio presently has none of these rights.

In Bell v. Burson, 402 U.S. 535, 542 (1971), the Court ruled that a hearing must precede the suspension of a driver's license. Again the procedures that the state statute provided were more protective than those afforded classified civil service employees in Ohio. The statute at issue in Bell at least granted a prior hearing on the issue of whether the person whose property was threatened was properly identified. In Ohio government employees are given no pre-termination protection of any kind.

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972) also support the

principle that the due process clause requires some sort of hearing prior to the deprivation of a protected property interest. In Fuentes tnis Court invalidated state pre-judgment replevin provisions on the ground that:

> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.
>
> . . . .
>
> [T]he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes place.

Id. at 82 (emphasis added). See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).[1]

1. In North Georgia Finishing the Court distinguished the intervening case of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), on the grounds that the

Fuentes did recognize that "truly unusual" and "extraordinary situations" could justify postponement of a hearing. 407 U.S. at 90. In such cases there must be "a special need for very prompt action." Id. at 91. Thus, this Court has not required a hearing prior to emergency action required by the exigencies of war, see, e.g., Bowles v. Willingham, 321 U.S. 503, 521 (1944); or bank failure, see, e.g., Fahey v. Mallonee, 332 U.S. 245 (1947). Similarly the court has found exigent circumstances where immediate action was necessary to protect consumers from contaminated food, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908), or

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deprivation in Mitchell occurred only after the issuance of a writ by a judge and that state law provided for an immediate post-deprivation hearing. Neither ground is applicable in the instant case.

misbranded drugs, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).[2]

None of these truly rare extraordinary circumstances are applicable here. Indeed, it cannot even be contended that summary discharge was necessary in this case to protect the government from serious disruption in the workplace. Cf. Goss v. Lopez, 419 U.S. 565, 582-583 (1975). Nor is the governing state statute limited to such exigent situations. In this case both the tenured government employees were valuable and efficient public servants who were summarily discharged for reasons which have not been shown to have been related to job performance.

2. See also Haig v. Agee, 453 U.S. 280, 309-310 (1981) (national security) and Bob Jones University v. Simon, 416 U.S. 725 (1974) (effective tax collection).

In Board of Regents v. Roth, 408 U.S. 564 (1972) this Court again recognized the general rule that some sort of prior hearing is required before a tenured government employee can be discharged:

> When protected interests are implicated, the right to some kind of prior hearing is paramount.

Id. at 569-570 (footnote omitted).

This holding in Roth is only just when this Court has held that a hearing is required before one's parole may be revoked, Morrissey v. Brewer, 408 U.S. 471 (1972), or a prisoner's "good-time" credits may be withheld, Wolff v. McDonnell, 418 U.S. 539 (1974). Again it should be emphasized that the government employees here are seeking less procedural protection than the Court found appropriate in Morrissey and Wolff.

Arnett v. Kennedy, 416 U.S. 134 (1974), is not contrary to the position of amicus herein. In Arnett, a majority of the justices of this Court explicitly found that the procedures statutorily afforded to the government employee there met the minimum requirements of the due process clause. See id. at 170-171 (Powell & Blackmun, J.J., concurring); id. at 195-196 (White, J., concurring in part and dissenting in part); id. at 206 (Marshall, Douglas & Brennan, J.J., dissenting). It is significant that in Arnett the statutory pre-termination procedures provided for access to the materials upon which the charge was based, the right to respond orally and in writing to the charges, and the right to present rebuttal affidavits. Id. at 140-143. The tenured government employ-

ees herein were given none of these protections and seek only the right to respond to the charge against them orally or in writing.

In essence the claim here is that tenured government employees facing the loss of their job are entitled to the same due process right to informally respond to the charges against them that this Court has granted to public school students facing a few days suspension from the classroom. See Goss v. Lopez, 419 U.S. 565 (1975).[3] It would be

3. Ingraham v. Wright, 430 U.S. 651 (1977), is not relevant to the instant case. Ordinarily disruption of the public institution is involved and the disciplinary infractions are directly observed by the teacher. Cf. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 n.24 (1978). In addition, common experience informs us that a child about to be paddled always expresses his side of the story, in one way or another.

perverse if a tenured teacher were held to have less due process protection than her student.

Neither Dixon v. Love, 431 U.S. 105 (1977), nor Mackey v. Montrym, 443 U.S. 1 (1979) are contrary to the position of amicus herein. Both involved exigent circumstances where the public safety required "the prompt removal of a safety hazard" from the roads and highways. Dixon v. Love, 431 U.S. at 114. Moreover, in Mackey this Court noted that a hearing was available contemporaneously with the suspension of the driver's license, 443 U.S. at 7, and "[a]t the very least, the arresting officer ordinarily will have provided the driver with an informal opportunity to tell his side of the story." Id. at 14. In the instant case the tenured government

employees are seeking no more due process protection than this Court assumed police officers afford suspected drunk drivers.

In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16 (1978), a case dealing with summary termination of utility services, this Court again recognized the basic principle relied upon by amicus herein. It is axiomatic that a classified civil service employee facing the devastating loss of employment should be entitled to as much due process as a utility customer threatened with a loss of service. The tenured government employees herein are asking no more and, under the due process clause of the fourteenth amendment, are entitled to no less.

Three recent employment cases clearly support the fundamental principle that

the due process clause requires some kind of prior hearing. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1983), this Court held that a hearing is required before a claim for unemployment compensation can be denied. Furthermore, in Barry v. Barchi, 443 U.S. 55, 65 (1979), dealing with the suspension of a harness racehorse trainer's license, the Court, recognizing the need for some kind of pre-suspension due process procedures, held:

> [A]lthough Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging, 16 days elapsed prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story to the State's investigators. (Emphasis added).

Finally, in Davis v. Scherer, 52 U.S.L.W. 4956 (1984), four members of this Court found that the constitutional requirement of an opportunity to be heard prior to termination of a protected property interest in government employment was "'clearly established' long before October 25, 1977." Id. at 4960 (Brennan, Marshall, Blackmun & Steven, J.J., dissenting). The majority in Davis agreed that "the decisions of this Court by 1978 had required 'some kind of hearing' . . . prior to discharge of an employee who had a constitutionally protected property interest in his employment." Id. at 4958. Indeed, the disagreement between the majority and dissent, insofar as it is relevant here, focused on whether the due process requirement of a prior opportunity to be

heard was satisfied where the employee "was informed several times of the Department's objection . . . and took advantage of several opportunities to present [his response]." Id. This, of course, was far more due process than the tenured government employees in the instant case were given or are asking.

This Court's holdings in Hudson v. Palmer, 52 U.S.L.W. 5052 (1984) and Parratt v. Taylor, 451 U.S. 527 (1981) are not contrary to the position of amicus. In this case there existed neither the "necessity for quick action by the State" nor the "impracticability of providing any meaningful predeprivation process." Id. at 539. Hudson and Parratt by their terms only apply when the deprivation of property is caused by the random and unauthorized conduct of a

state employee. Hudson v. Palmer, 52 U.S.L.W. at 5056.

In essence, it is the position of the amicus herein that, at a minimum and in the absence of extraordinary circumstances, classified civil service employees with a protected property interest in their government employment should not be confronted with an impersonal, autocratic, and unexplained administrative decision that leaves them bewildered, confused, and jobless, and then have to wait months for a post-termination hearing in order to have an initial opportunity to correct or clarify what might well be a bureaucratic error. Simply stated, the due process clause of the fourteenth amendment requires that such a government employee be given, at a minimum, an opportunity to respond, ver-

bally or in writing, to the charge against him prior to his termination. See Davis v. Scherer, 52 U.S.L.W. 4956, 4958 (1983); id. at 4960 (Brennan, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 569-570 n.7 (1972). Cf. Goss v. Lopez, 419 U.S. 565 (1975).

B. A Balancing Of The Magnitude Of The Private Interest In Continued Government Employment, The Grave Risk Of Erroneous Deprivation And The Insubstantial Government Interest In Routine Summary Dismissals Of Its Employees Confirms The Constitutional Requirement Of A Prior Opportunity To Respond.

In Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976), this Court held:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official

> action; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Although a balancing of the Mathews factors strongly supports the efficacy of an opportunity to respond, orally or in writing, prior to the termination of a protected interest in government employment, such a balancing would be inappropriate in the instant case. This Court has repeatedly held that the Mathews balancing test is relevant only to the issue of the specific dictates of due process, not to the recognition of the

fundamental right to some kind of prior hearing. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-434 (1983); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16-17 (1978); Goss v. Lopez, 419 U.S. 565, 575-576 (1975). This basic principle was most clearly stated by this Court in Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972):

> The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. . . . . But some form of notice and hearing--formal or informal --is required before deprivation of a property interest that "cannot be characterized as de minimis." Sniadach v. Family Finance Corp., supra, at 342 (Harlan, J. concurring) (emphasis in original).

In Matthews this Court only proceeded to balance the relevant factors after it

had first decided: "[t]his Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." 424 U.S. at 333. This Court thereafter engaged in the balancing of interests only to determine whether Eldridge was entitled to more than merely an opportunity to comment in writing prior to the termination of his Social Security benefits. Id. at 324, 338, 346.

In the instant case the Ohio classified civil service employees were denied any right to respond to the charge against them, either orally or in writing, prior to their termination. Thus, since the issue in this case is simply the availability of the most minimal due process rights, it would be inappropriate for the Court to engage in a balancing of the factors test.

It is equally clear, however, that a balancing of the relevant factors set forth in Mathews simply confirms the constitutional necessity of guaranteeing an opportunity to respond, orally or in writing, prior to the termination of protected government employment. It cannot be doubted that the private interest in continued government employment, by those who have a protected property interest in their jobs, is significant. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1983).

Justice Marshall eloquently explicated the gravity of a loss of employment in Arnett v. Kennedy, 416 U.S. 134, 220-21 (1974) (dissenting opinion):

> Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. . . . The loss of

> income for even a few weeks may well impair their ability to provide the essentials of life--to buy food, meet mortgage or rent payments, or procure medical services. . . .
>
> A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected.

Moreover, there are important intangible private interests at stake when a tenured government employee is discharged. As the court below recognized, "Employment provides not only financial livelihood, but frequently self-esteem and social status." Loudermill v. Cleveland Board of Education, 721 F.2d 550, 561 (6th Cir. 1983). Finally, a tenured government employee has a significant interest in "being personally talked to about the decision rather than

simply being dealth with." L. Tribe, American Constitutional Law 504 (1978) (emphasis in original). In other words, the due process clause, in addition to serving to prevent erroneous deprivations, also has as a central purpose "the promotion of participation and dialogue by affected individuals in the decision-making process." Marshall v. Jerrico, Inc., 446, U.S. 238, 242 (1980).

It is irrelevant that the deprivation may be only temporary. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Fuentes v. Shevin, 407 U.S. 67, 82 (1972), quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972).

The second factor of the Mathews balancing test, the gravity of the risk

of erroneous deprivation absent procedural protection, also compels the conclusion that, at a minimum, the due process clause guarantees a tenured government employee the opportunity to respond to the charge against him prior to termination of employment. The present Ohio system of summary termination is the essence of arbitrariness inasmuch as it wholly substitutes a bureaucratic edict in place of reasoned factfinding. In the often highly charged atmosphere of the workplace, the possibility of an erroneous decision to terminate an employee is significant. Often such errors are the result of personal animosities, mistaken identity, unreliable information sources, cloudy memories or faulty perceptions. See Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting).

As this Court found in Goss v. Lopez, 419 U.S. 565, 580 (1975):

> Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.
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> . . .
>
> But it would be a strange disciplinary system in [a governmental] institution if no communication was sought by the disciplinarian with the [employee] in an effort to inform him of his dereliction and let him tell his side of the story in order to make sure that an injustice is not done.

The validity of the Court's observation in Goss is confirmed by the wisdom of Justices Frankfurter and Holmes:

> [A]n admonition of Mr. Justice Holmes becomes relevant. "One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point." . . . ." The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." . . . Appearances in the dark are apt to look different in the light of day.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-171 (1951) (Frankfurter, J., concurring), quoting United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Frankfurter, J. dissenting).

Government employers are not immune to the same human vices and foibles that have given rise to a recognition of the need for due process protection in other

areas. They can and do make mistakes, they can and do act arbitrarily, discriminatorily and unconstitutionally. See, e.g., Branti v. Finkel, 445 U.S. 507 (1980); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Abraham v. Pekarski, 728 F.2d 167 (3rd Cir. 1984). Some degree of pre-termination procedural protection for the tenured government employee is essential.

A post-termination hearing is an inadequate substitute for a pre-termination opportunity to respond to the charge, not only because of the inherent delay and hardship to the individual but, more importantly, because there is a significant danger that the post-termination hearing may result in an after the fact rationalization for a

bureaucratic decision which has already been made. See L. Tribe, American Constitutional Law 544 (1978).

On the other hand, a pre-termination opportunity to respond to the charge operates as a significant protection against improprieties and errors by guaranteeing that the values of accuracy, accountability, visibility, integrity and consistency are met. Cf. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

Insofar as the third prong of the Mathews balancing formula, the weight of governmental interest, is concerned, it is clear that there is no substantial state interest in denying a tenured government employee the opportunity to respond to the charge against him before being discharged.

Any marginal, if not non-existent, administrative burden cannot outweigh the constitutionally protected right to due process. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 90 (1972); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Bell v. Burson, 402 U.S. 535, 540-541 (1971). This is particularly true where the minimal due process procedure sought to be imposed on the state is no more than that which would be self-imposed by any professional, conscientious administrator. Cf. Goss v. Lopez, 419 U.S. 565, 583 (1975):

> [W]e do not believe that we have imposed procedures on . . . disciplinarians which are inappropriate. . . . Instead, we have imposed requirements which are, if anything, less than a fair-minded [administrator] would impose upon himself in order to avoid unfair suspensions.

Moreover, the discharge of a tenured government employee imposes significant costs upon the government which cannot be ignored. Such a discharge causes the loss of all the personnel investments already made in the employee: recruitment, selection, training and evaluation. In addition, when the discharged employee is replaced the same costs must be incurred by the government a second time. If the terminated employee is later reinstated the government will then have to bear the burden of a returning employee imbued with cynicism and frustration over his unjust treatment. In brief, the government shares the individual's interest in a prompt and accurate pre-termination procedure. Cf. Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

In conclusion, a pre-termination opportunity to respond to the charges against him will serve the interests of both the tenured government employee and the government employer at virtually no expense, and probably a net financial gain, for the government. See, e.g., Loudermill v. Cleveland Board of Education, 721 F.2d 550, 562 (6th Cir. 1983); Vanelli v. Reynolds School Dist., 667 F.2d 773, 779 (9th Cir. 1982); Thurston v. Dekle, 531 F.2d 1264, 1272-1273 (5th Cir. 1976).

C. An Individual May Not Be Deprived Of Constitutionally Guaranteed Due Process Rights By The Niggardly Procedures Afforded By A State Statute.

In the instant case it is undisputed that Loudermill and Donnelly have a protected property interest in their

government employment by virtue of Ohio Rev. Code Ann. § 124.34 (Page 1978) and could not be terminated other than "for cause". Simply because this property interest is created by a state statute, however, it does not follow that the State may emasculate the due process procedural guarantees mandated by the fourteenth amendment to the United States Constitution by the expediency of specifying lesser procedures in the same state statute.

Allowing the State to condition its grant of a property right upon inadequate procedural protections would be contrary to the entire corpus of this Court's right-privilege decisions. See W. Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Corn. L. Rev. 445, 462 (1977).

Requiring a government employee to forfeit his constitutionally guaranteed due process rights as a condition of acceptance of a statutorily conferred property interest would repudiate "one hundred years of settled Supreme Court practice . . . ." D. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 Calf. L. Rev. 146, 176 (1983), citing Pennoyer v. Neff, 95 U.S 714 (1878).

Fortunately tnis Court has consistently held that procedural provisions of state statutes do not govern whether an individual has a protected liberty or property interest or what procedural safeguards are necessary to protect that interest. See, e.g., Santosky v. Kramer, 455 U.S. 745, 755 (1982); id. at 775 (Rehnquist, J.,

dissenting); Vitek v. Jones, 445 U.S. 480, 490-491 & n.6 (1980); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell & Blackmun, J.J., concurring); id. at 185 (White, J., concurring in part and dissenting in part); id. at 211 (Marshall, Douglas & Brennan, J.J., dissenting). This clearly established principle has been stated most recently and forcefully in Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982):

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Vitek v. Jones, 445 U.S. 480, 491 (1980). . . . Indeed, any other conclusion would allow the State to destroy at will

> virtually any state-created property interest. The Court has considered and rejected such an approach: "While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." Vitek v. Jones, 445 U.S., at 490-491, n.6, quoting Arnett v. Kennedy, 416 U.S., at 167 (opinion concurring in part). (Brackets in original).

As a matter of simple justice and fundamental constitutional principle Ohio must not be permitted to condition its statutory grant of a protected property interest in classified civil service employment upon constitutionally inadequate statutory procedural provisions.

II. DELAY OF MORE THAN NINE (9) MONTHS BEFORE A CLASSIFIED CIVIL SERVICE EMPLOYEE IS GRANTED A DECISION ON HIS POST-TERMINATION ADMINISTRATIVE APPEAL VIOLATES THE DUE PROCESS CLAUSE.

The fundamental requirement of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1908). If the opportunity to be heard is to have any significant import, it must be granted "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

When the state deprives an individual of a property interest the length of wrongful deprivation is an important factor in assessing the impact of the official action on the private interest. Fusari v. Steinberg, 419 U.S. 379, 389 (1975). Furthermore, the rapidity of administrative review is a significant

factor in assessing the sufficiency of the entire process. Id. See also Gerstein v. Pugh, 420 U.S. 103 (1975).

Consequently, when a property interest is implicated, this court has declared particular administrative processes constitutionally adequate or inadequate contingent on the availability of a prompt hearing and prompt administrative disposition. Barry v. Barchi, 443 U.S. 55 (1979); Mackey v. Montrym, 443 U.S. 1 (1979); Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973).

Similarly this court has considered the adequacy and availability of pre-deprivation procedures in assessing the impact of delay in post-deprivation hearing and review. Where pre-deprivation procedure is meager, post-deprivation delay has been found

constitutionally intolerable. Cf. Goss v. Lopez, 419 U.S. 565 (1975).

The nine-month delay under consideration here differs drastically from the three-month delay tacitly approved in Arnett v. Kennedy, 416 U.S. 134 (1974), because of the obvious temporal disparity, and the conspicuous absence of any meaningful pre-termination procedural safeguards in the instant case. See id. at 137.

The administrative torpor under which a discharged public employee labors in Ohio is most acutely demonstrated through a chronicle of cross-petitioner Loudermill's experience. Loudermill was discharged by letter on November 3, 1980. He filed his request for a full hearing on November 12, 1980. On August 10, 1981, the Civil Service Commission

finally affirmed Loudermill's discharge after protracted administrative proceedings.

Amicus contends that a nine-month delay between discharge and the administrative resolution of that action is per se unreasonable and violative of the discharged employee's right to due process. A hearing clearly loses its capacity to be meaningful to the employee after such a prolonged delay and, instead, imposes an irreparable injury upon the discharged employee.

The public employee's interest in continued employment is a substantial one. Logan v. Zimmerman, 455 U.S. 422, 434 (1982). Once deprived of that employment, the discharged public employee, not unlike the license suspendee, has a significant interest in the

prompt disposition of the State's claims against him. See Barry v. Barchi 443 U.S. 55, 66 (1979). That the discharged public employee may seek other employment during that interim is at best a tenuous proposition. "The employee may not be able to secure a satisfactory position in the private sector, particularly a tenured one, and his marketability may be under a cloud due to the circumstances of his dismissal." Arnett v. Kennedy, 416 U.S. 123, 194 (1974) (White, concurring and dissenting). See also id. at 219 (Marshall dissenting).

Moreover, an Ohio public employee who is discharged for cause is precluded from seeking unemployment compensation. Ohio Revised Code § 4141.29(D); see also Christian v. New York State Department

of Labor, 414 U.S. 614 (1974). Similarly, the discharged government employee may be barred from collecting welfare benefits absent his willingness to liquidate significant personal possessions, including his home and car. Ohio Administrative Code §§ 5101:1-5-05, -06.

It is obvious that the longer the period between the discharge and the hearing the more devastating will be the impact of the loss of employment. A weekly paycheck may be the only thing that stands between the discharged employee and the forfeiture or repossession of his home, car and other possessions. Cf. Fuentes v. Shevin, 407 U.S. 67 (1972); Fusari v. Steinberg, 419 U.S. 379 (1975).

Therefore the notion that a wrongfully discharged employee may be made whole by eventual reinstatement and back pay, where that employee has been deprived of his regular income in excess of nine months, misperceives the full injury inherent in such a delay. Indeed the public employee may suffer virtually the full impact of the injury occasioned by the delay before he may contest his termination. See Barry v. Barchi, 433 U.S. 55, 66 (1979). See also Comment, Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees; 10 Harv. Civil Rights-Civil Lib. L. Rev. 472, 479.

The lower court observed that the employee could have, but did not, institute a mandamus action. Loudermill v. Cleveland Civil Service

Commission, 721 F.2d 550, 564 (1983). Amicus maintains that mandamus, while theoretically available, State ex. rel. Hamlin v. Collins, 9 Ohio St.3d 117 (1984), is an inadequate remedy for the discharged employee who awaits administrative review. Since mandamus is not available to enforce discretionary duties, Cf. Heckler v. Ringer, 52 U.S.L.W. 4547 (1984), mandamus would not be available to remedy the delay presented in this case, absent a court holding that such a delay violated the employee's due process rights. But in Ohio the statutory requirement that a hearing be held within thirty days, Ohio Rev. Code Ann. § 124.34 (Page 1978) has been held to be merely a guideline and not mandatory. In re Bronkar, 53 Ohio Misc. 13, 372 N.E.2d 1345 (1977).

In addition, the government's fiscal and operational interests would be best served by providing the discharged employee with a prompt post-termination hearing. Indeed, Ohio Rev. Code Ann. § 124.34 (Page 1978) constitutes the State legislature's own recognition of this fact by virtue of its specification that such a post-termination hearing be held within thirty days following discharge.

When the government employer discharges an employee, it must necessarily hire and train another individual to fill the vacancy left by the terminated employee.

The effect of any appreciable delay is two-fold where the discharged employee ultimately wins reinstatement. During the pendency of the appeal the replace-

ment employee may have acquired tenured status, and the State is liable for a back pay award to the wrongfully discharged employee as well as being liable for the wages of the replacement employee.

The longer the delay between discharge and hearing, the more expense will be incurred by the State in providing the hearing itself. All legal proceedings are expensive and the more protracted such proceedings become and the higher the stakes rise the more costs will be incurred by the State in prosecuting the case and providing the forum. Cf. Santosky v. Kramer, 455 U.S. 745, 763 (1982). The State cannot in good faith assert any counterbalancing savings arising from abandoned claims by discharged employees since it is clear

that the government has no legitimate interest in using delay as an instrument of economic duress.

Substantial delay in the provision of a post-termination hearing imposes significant and unnecessary costs, both financial and other, upon the discharged employee and the government. These costs far outweigh any illusory benefit thought to be gained.

Indeed, as this court concluded in Barry v. Barchi, 443 U.S. 55, 66 (1979):

> We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of [its initial termination decision].

CONCLUSION

Therefore, amicus respectfully requests this court to affirm the pre-termination procedures that the lower court found mandated by the due process clause. In a time of ever worsening individual alienation, and of an increasingly large, bureaucratic, and impersonal government, it is necessary to impose a constitutional mandate of civility, courtesy, and even humanity upon institutions not renowned for such characteristics.

Imposing such a requirement would cost nothing--it would simply make the administrator talk to an individual before taking action affecting him.

Additionally, amicus respectfully requests this court to reverse the lower

court and find that the substantial delay presented in this case was unreasonable, and violated the discharged employee's due process rights. In this case, justice delayed was indeed justice denied.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law. . . ."

2. Ohio Administrative Code § 5101:1-5-05 states, as follows:

> 5101:1-5-05 Personal property requirement for GR
>
> (A) The value of non-exempt personal property for general relief applicants/recipients is subject to certain maximum limitations.
>
> (1) The total value of all nonexempt personal property may not exceed two thousand two hundred fifty dollars for the individual or the assistance group.
>
> (2) In addition to the ceiling of two thousand two hundred fifty dollars on the total value of all

types of nonexempt personal property, there are sub-limits on liquid assets, life insurance, motor vehicles, and farm and business machinery.

(a) The individual/family may retain cash or other negotiable items convertible to cash (stocks, bonds, trust deeds) up to a total value of three hundred dollars. The limit applies to the total family included in the assistance group, not to the individual member of the family.

(b) Life insurance whose total cash surrender value is no more than five hundred dollars may be retained by each individual whose needs are included in the assistance grant. The cash surrender value of all policies in the assistance group combined with all other personal property cannot exceed two thousand two hundred fifty dollars.

(c) Any number of motor vehicles may be retained provided the total net value of all vehicles does not exceed one thousand two hundred dollars. Motor vehicles include auto-

mobiles, trucks, campers, vans, motorcycles, trailers, boats, snowmobiles, and motorboats.

3. Ohio Administrative Code § 5101:1-5-06 states, as follows:

5101:1-5-06 Real property requirement

A person may retain land and improvements (e.g., buildings) as long as it is being used to provide support for that person and provided the person has the right to possess, use, control or dispose of that property. Real property may be utilized in one of three ways:

(A) May be used as the person's home provided that:

(1) Value as determined by the county auditor as the market value minus encumbrances or liens does not exceed $12,000.

(2) The person's home is defined as the house used by the applicant/recipient and his spouse and the land adjoining which is not readily separable from the house.

(B) May be used to produce income for the support of the person provided:

(1) Annual net income produced equals at least six percent (6%) of the market value as determined by the county auditor; and

(2) Monthly net income produced is used for the support of the person.

(C) Must be sold and the proceeds used for the support of the person. This requirement will be considered met if the property is:

(1) Listed for sale at a value not less than the value determined by the county auditor as the market value, and

(2) No offer is refused that is at least 90% of the value determined by the county auditor as the market value.

4. Ohio Rev. Code Ann. § 124.34 states, in pertinent part, as follows:

Tenure of office; reduction, suspension, and removal; appeal

The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services, or the commission, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a

violation of Chapter 102 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to

hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

5. Ohio Rev. Code Ann. § 4141.29 states, in pertinent part, as follows:

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

(1) For any week with respect to which the administrator finds that:

(b) He has been given a disciplinary layoff for misconduct in connection with his work.

(2) For the duration of his unemployment if the administrator finds that:

(a) He quit his work without just cause or has been discharged for just cause in connection with his work.